Downtown Hotel v Mutua (Appeal 131 of 2022)
[2026] KEELRC 222 (KLR) (29 January 2026) (Judgment)

Neutral citation: [2026] KEELRC 222 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL 131 OF 2022

ON MAKAU, J

JANUARY 29, 2026

BETWEEN

DOWNTOWN HOTEL ..... APPELLANT

AND

PETER ISSA MUTUA ..... RESPONDENT

JUDGMENT

Introduction

1. This is a first appeal from the Judgment of Hon. Selina Muchungi (SRM), delivered at Nairobi on 3rd December 2021 in an employment termination case. The Respondent instituted a claim before the subordinate court seeking redress for alleged unfair termination of employment, unpaid salary, underpayment and other terminal benefits. He pleaded that he was employed by the Appellant in February 2005 as a Finance Clerk and later he was promoted to Assistant Finance Manager, earning a monthly salary of Kshs. 16,000. He further averred that he was unlawfully dismissed for no valid reason and without following the procedure under section 41 of the *Employment Act*. He also averred that the employer had, throughout the period of their engagement, underpaid his salary and failed to give him annual leave. Therefore, he quantified his claim at Kshs.2,070,391.40 made up of accrued employment benefits plus compensation for unfair termination.

2. The Appellant's case, on the other hand, was that it employed the Respondent as a Cashier/ Receptionist/Room Attendant until 10th June 2019 when it dismissed him from service. It was further Appellant's case that it followed fair disciplinary process that was initiated on allegations of theft and financial misconduct.

3. After considering the facts of the case the trial court concluded that the Respondent was employed as a Cashier and his dismissal was unfair. She further found that the Appellant had underpaid salary to the respondent and failed to give him annual leave. She then awarded him the following reliefs:-

a. A declaration that the termination was unfair and unlawful.

b. The Respondent was employed as a Cashier whose minimum was wage of Kshs. 30,627.45.

c. Awards totalling Kshs. 1,257,082.89, comprising:

i. Unpaid salary for June 2019 – Kshs. 10,209.15

ii. One month's salary in lieu of notice – Kshs. 30,627.45

iii. Accrued leave days – Kshs. 183,701.59

iv. Underpayment of salary – Kshs. 756,897.65

v. Compensation for unfair termination (9 months) – Kshs. 275,647.05

Grounds of the appeal

4. By a Memorandum of Appeal dated 19th January 2022, the Appellant prayed for setting aside of the impugned judgment in its entirety on the following grounds:-

a. That the Learned Trial Magistrate erred in law and fact in holding that the respondent was employed as a Cashier and as a Room Attendant/Receptionist.

b. That the Learned Trial Magistrate erred in law and fact in holding that the respondent's dismissal was unprocedural and substantively unfair despite the weight of the evidence placed on record by the Appellant.

c. That the Learned Trial Magistrate erred in law and fact by failing to appreciate that the process leading to the termination of the respondent was fair, lawful and constitutional.

d. That the Learned Trial Magistrate erred in law and fact in failing to take into account the principles of making an award of compensation as set out under section 49 and 50 off the *Employment Act*.

e. That the Learned Trial Magistrate erred in law and fact in making a finding that the Appellant had failed to prove its case to the required standard and further dismiss the case with costs to the respondent.

5. The parties filed comprehensive written submissions to dispose of the appeal. For the Appellant, it was submitted that the trial court had no basis for computing the sums payable to the Respondent because he contradicted himself when he indicated in his written statement that he was employed as Finance Clerk but in his oral testimony he stated that he was an Assistant Finance Manager. It was argued that a Job Description for the respondent was necessary in order to ascertain where to place him in the General Wage Order.

6. It was further submitted that the trial court erred in concluding that the respondent was unfairly dismissed, yet there was sufficient evidence to show that he had taken away some money from the employer and plucked off copies of the receipt books. Further that the court erred by finding that the fair procedure was not followed the respondent was called to a disciplinary meeting but failed to give satisfactory explanation on the allegation against him.

7. Finally, it was submitted that the trial court erred by awarding the respondent unjustified sums of money without a legal basis. It was argued that the trial court should have capped the award on accrued leave and salary underpayment to three years based on the limitation period established by

the *Employment Act* and not the 14 years served by the respondent. As regards the compensation equivalent to 9 months salary the same was deemed unjustified because the dismissal was lawful and fair. Consequently this court was urged to set aside the entire judgment with costs.

8. For emphasis, reliance was placed on the case of Adpack Limited v Kwenjo Joel Nyamasage [2025] KEERLC 262 (KLR) and Apex Steel Limited v Dominic Mutua Muendo [2019] eKLR wich held...

9. On the other hand, it was submitted for the Respondent that this court should exercise caution while reviewing the trial court's finding of fact. The court was referred to the case of Ann Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR in which the Court of Appeal discussed the mandate of the court in a first appeal.

10. It was submitted the trial court was right in concluding that the Respondent was employed as a Cashier as that finding was based on the evidence tendered. It was argued that even the Witness Statement by Mr. Bakari Ali (DW1) dated 16th August 2021 confirmed that the respondent was working as a Cashier/Receptionist/Room Attendant and his duties included collection of payments at the hotel and Rooms. Therefore, the court was urged to affirm the finding by the trial court that the respondent was employed as a Cashier and that his salary was underpaid.

11. To buttress the above submission, reliance was placed on the case of Joseph Omollo v Board of Management Kisumu Boys High School [2016] eKLR where the court held that, in any legal proceedings, the employer is required to produce a written contract or particulars of employment prescribed by the law and in default bear the burden of proving or disproving any alleged term of employment stipulated in the contract. It was submitted that the Appellant did not discharge the said burden by evidence to rebut the evidence that led to the conclusion that the Respondent was serving as a Cashier.

12. In addition, it was submitted that the trial court was right in finding that the dismissal of the Respondent was unfair and unlawful as no specific charge was made against him in the suspension letter issued on 15th May 2019 and which invited him to a disciplinary hearing on 3rd June 2019. It was submitted that the allegation in the said letter was that there was theft in his department but no evidence was tendered to show that he was the only employee in the department.

13. It was further submitted that the he was not given a fair hearing since he was not informed of the specific charge against him during the meeting, he was not accompanied by any witness and that the disciplinary committee was not properly constituted as its members were conflicted. It was argued that the respondent did not adequately prepare for hearing since he was not made aware of the specific charges against him until the disciplinary meeting.

14. Further that the DW1 retracted the allegations of forgery and fake receipts against the respondent during his testimony in court, and confirmed that all the receipts were genuine. Besides the dismissal letter dated 10th June 2019 did not state any reason for the termination and as such it is not clear whether he was dismissed for theft or not.

15. For emphasis, reliance was placed on the case of David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR and National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR where the court underscored the requirement of a fair termination of employment.

16. Finally, it was submitted that the computation of damages by the trial court was well reasoned and as such it ought not to be disturbed. It was further argued that the DW1 merely alleged that the respondent had declined to collect his terminal dues assessed at Kshs.137,000 but he did not produce copy of the tabulation as an exhibit. As regards the award of compensation for unfair termination, it

was urged that the same well supported by reason. Consequently, the court was urged to dismiss the appeal with costs.

Mandate of this Court.

17. This being a first appeal, it is the duty of this Court to re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusions while appreciating that an appellate court should exercise deference in relation to findings of fact and discretionary awards. This principle is settled. In Anne Wambui Ndiritu V Joseph Kiprono Ropkoi & Another [2004] eKLR, the Court of Appeal stated:-

> " As a first appellate Court we are not bound by the findings of fact made by the superior court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial judge... This Court will however interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did."

18. Similarly, in J. S. M. v E. N. B. [2015] eKLR, the Court of Appeal reiterated that an appellate court will not lightly differ with findings of fact but is enjoined to interfere where the conclusions are based on no evidence, a misapprehension of evidence, or where the Judge demonstrably acted on wrong principles.

19. Following the above guidance, I have perused the record of appeal including the evidence adduced before the trial court and impugned judgment. The issues for determination in this appeal are:-

    a. Whether the Respondent was employed as a Cashier.

    b. Whether the dismissal of the Respondent was unfair and unlawful.

    c. Whether the award of damages awarded should be interfered with.

Analysis of the issues

(a) The Respondent's position and remuneration

20. The first ground of appeal challenges the finding that the Respondent was a Cashier entitled to a minimum monthly salary of Kshs. 30,627.45. I see no major problem in resolving this issue. DW1 adopted his written statement dated 16th August 2021 as his evidence during the trial. Paragraph 3 of the statement was to the effect that:

> " That the Claimant was working as a Cashier/Receptionist/Room Attendant for the respondent and not as an Assistant Finance Manager as stated in the Memorandum of Claim."

21. The above express acknowledgment of the respondent's position was voluntarily made by DW1 before his advocate and confirmed under oath before the trial court when he adopted the statement as his testimony. During the trial, the respondent stated that his duties included collecting money from clients, writing receipts, doing purchases and hand over the balance to DW1 at the end of the day. The

Appellant did not rebut the said evidence by producing a written contract or any other evidence as required under section 10(7) of the *Employment Act* which states that:

> "If in any legal proceedings an employer fails to produce a written contract or written particulars prescribed in subsection(1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer."

22. The legal consequence of an employer's failure to discharge this duty was articulated in Joseph Omollo V Board Management Kisumu Boys High School [2016] eKLR, where the Court held:-

> " According to section 74 of the *Employment Act* it is the duty of the employer to keep records of all its employees... It was therefore the responsibility of the Respondent to produce such records... Failure of the Respondent to produce such records shifts the burden of disproving allegations of the claimant as provided in section 10(6) and (7)..."

23. In the instant case, the Learned Trial Magistrate, at page 144 of the Record, concluded that based on the evidence of his duties (collecting payments), the Respondent was a Cashier. The above finding of fact was founded on the evidence adduced by the parties that showed that the duties done by the respondent were those of a Cashier.

24. The trial court was entitled, in the circumstances of the case, to rely on the available evidence to ascertain the Respondent's role. I find no error in the conclusion that the Respondent performed duties of a Cashier. The precise job title is less consequential than the nature of the work performed for the purpose of applying the relevant Wages Order. Consequently, I hold that the trial court was right in concluding that the respondent was a Cashier and that finding shall stand.

Unfair and unlawful dismissal

25. The Appellant asserted that the dismissal was lawful because the respondent misconducted himself and when called to a disciplinary meeting, he failed to exonerate himself. However, the Respondent was of a contrary view and maintained that the there was no a valid reason to justify his dismissal and the procedure set out under Section 41 of the *Employment Act* was not followed.

26. The question of what constitutes unfair termination of employment is now settled. Section 45 of the *Employment Act* provides that:

> "(1) No employer shall terminate the employment of an employee unfairly.
>
> (2) A termination of employment by an employer is unfair if the employer fails to prove:
>
> (a) that the reason for the termination is valid;
>
> (b) that the reason for the termination is a fair reason—
>
> i. related to the employee's conduct, capacity or compatibility; or
>
> (ii) based on the operational requirements of the employer; and
>
> (c) that the employment was terminated in accordance with fair procedure."

27. It follows that, for a party to succeed in a claim for unfair/unlawful termination, he must establish a prima facie case that a termination of his employment contract has occurred; that the termination was not grounded on a valid reason; and/or that the employer did not follow a fair procedure. Once the employee establishes the said facts the burden of proof shifts to the employer to justify the grounds for the termination and procedural fairness. Section 47(5) of the Act states that:-

> " For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

28. Section 41 of the Act provides that:-

> "(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."

29. In the instant case, the Respondent was served with a Suspension letter dated 24th May 2019 which stated as follows:

> " Following the incidence of theft that occurred in your department on 15th May, 2019, please note that you have been suspended from your employment in Downtown Hotel, Nairobi from the date of this letter thus you are not to report to work or to do any work.
>
> The disciplinary meeting will be held on 3rd June, 2019 at Downtown Hotel at 09:00 Oclock in the morning. Please note that you can come with a witness of your choice.
>
> Take note that failure to attend the said meeting, the process will still take place and the disciplinary committee will proceed to make the necessary decision you absence notwithstanding
>
> Your faithfully,
>
> Mohamed Madhbuti - Director
>
> Down town Hotel".

30. The dismissal letter then stated that:-

> " We refer you to the issue that was highlighted during the disciplinary meeting held at our offices in Downtown Hotel, Nairobi on 3rd June, 2019 where a complaint regarding your conduct at work was discussed.

Upon being called upon to show cause why disciplinary action should not be taken against you, it was concluded that you did not give any satisfactory reasons and that you acted contrary to the employment rules and regulations.

Due to the foregoing we regret to inform you that you are summarily dismissed from Downtown Hotel, Moktar Daddah Street, Nairobi in line with section 44(4) (c) and (g) of the *Employment Act*, 2007 as from the date of this letter.

We undertake to pay your dues less all statutory deductions.

Yours faithfully,

Mohamed Madhbuti

DIRECTOR

DOWN TOWN HOTEL

Cc: Human Resource Department."

31. The dismissal letter did not state the reason for the dismissal and therefore one has to refer to the charges set out in the suspension letter. The suspension letter referred to a specific theft incidence that occurred in the respondent's department on 15th May 2019. The amount involved was not stated and the nature of the money was not specified, that is, whether it was sales or just money kept in safe custody. The appellant did not prove the said theft during the disciplinary hearing and instead changed the story and engaged in a wild goose chase which ended with a dismissal for no specific reason.

32. During the trial, the DW1 produced a bundle of documents including an alleged Forensic Audit Report which was not proved by the author. The report was not conclusive and it did not support the allegations of theft incidence of 15th May 2019. Besides the audit was done after the dismissal and the respondent was not involved. The said information could not constitute the reason for dismissal. Section 43 (2) of the *Employment Act* defines reason(s) for termination of employment contract as:-

> " ... the matters that the employer at the time of the termination genuinely believed to exist, and which caused the employer to terminate the services of the employee."

33. Taking into account the evidence and submissions on record, I find and hold the appellant did not prove the reason for dismissing the respondent. I gather support from David Gichana Omuya V Mombasa Maize Millers LTD [2014] eKLR, Radido, J held that:-

> " The ordinary worker in Kenya now has security of tenure and cannot be dismissed at will. The employer must justify the grounds and prove the reasons"

34. As regards the procedure followed, there is no doubt that the appellant notified the respondent, the specific allegation it had against him and invited him to a disciplinary hearing on 3rd June 2019. However, as observed above, the appellant abandoned the said charge and engaged in a wild goose chase. The Respondent testified that he was not prepared for the new allegations which were only made during the disciplinary meeting. This court finds the said disciplinary process unfair as the employer abandoned the charges contained in the letter inviting the employee to the hearing and conveniently formulated new ones.

35. I gather support from the case of Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR where the Court of Appeal held, that:-

> " There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination / dismissal (Section 43); prove reasons are valid and fair (Section 45) ... A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination."

36. Further, the essential requirements for procedural fairness were laid down in Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR as follows:-

> " Four elements must thus be discernible for the procedure to pass muster:
>
> (i) an explanation of the grounds of termination in a language understood by the employee;
>
> (ii) the reason for which the employer is considering termination;
>
> (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
>
> (iv) hearing and considering any representations made by the employee and the person chosen by the employee."

37. Having found that the appellant did not prove that the dismissal of the respondent was grounded on a valid reason and that a fair procedure was followed, I hold that the dismissal was indeed unfair and unlawful as determined by the trial court.

Quantum of damages awarded

38. The Appellant challenges the awards for accrued leave, underpayment, and compensation. It is well settled law that an award of damages can only be interfered with, if certain thresholds are met. In Butt v Khan [1978] eKLR the Court of Appeal held that:-

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

39. As regards the award of accrued Leave for 14 years equalling to Kshs. 183,701.59, the Appellant argued that the same was not specifically prayed for and it was time-barred save for the period of three years. The Respondent did not say much on the issue of accrued leave.

40. There is no doubt that annual leave is a statutory entitlement under Section 28 of the *Employment Act*. Whether leave can be accumulated is a matter that depends on the terms of the contract or regulation. In Mungai v Alibhai Shariff & Sons Ltd [2024] KEELRC 13469 (KLR) the Claimant prayed for 22 years leave but Baari J awarded leave for three years only. In Icom Engineering Co. Limited v Juma [2025] KEELRC 516 (KLR) Abuodha J held that unpaid leave forms part of continuous injury which cannot be taken away.

41. In Rander Limited v Mwinyi Hamisi Sare Ali & another [2024] KEELRC 1421 (KLR) the claimant sought accumulated leave for three years but Mbaru J held that Under the *Employment Act*, leave can only accumulate for eighteen months. Again in Aron v Bokhol transporters limited Mbaru J held that under section 28(4) of *Employment Act* leave does not accrue beyond 18 months unless the employer approves.

42. From the foregoing analysis and other decisions not cited here, it is clear that the jurisprudence has not been settled. The lack of uniformity could be due to terms of individual contracts, HR Policies, Collective Agreements and Regulations in the various sectors. As such where there is nothing to refer to section 28 of the *Employment Act* provides the minimum terms of service. subsection (4) provides that :

> "(4) the uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection(1)(a) being the period in respect of which the leave entitlement arose."

43. The above provision clarifies that leave does not accumulate beyond a period of eighteen months after it becomes due. The corollary to the foregoing is that leave will be forfeited if not utilised within the time allowed by subsection (4) unless the employer approves. I therefore agree with the position by Mbaru J in the above decisions and hold that the Respondent forfeited his leave save for a period of 18 months before the termination.

44. As regards award of Kshs. 756,897.65 as underpayment, I seek guidance from the case of Germany School Society & another v Ohany & another [2023] KECA 894 (KLR) where the Court of Appeal held that:-

> "Normally, are belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing for the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On contrary the said claims fall within the ambit of continuing wrongs contemplated under section 90."

45. Under section 90 of the *Employment Act* a continuing injury claim expires after the period of 12 months immediately after the ceasation of the injury. In this case the continuing injury ended on the day of the termination of employment, that is, 10th June 2019. The suit was filed within a shorty period of time after the termination, and Consequently, the respondent was entitled to the trial court's award of underpayment for 14-year and it shall not be disturbed.

46. The award of Compensation of Kshs. 275,647.05 being 9 months' salary will not be interfered with because the trial court cited her reasons for the award as required under Section 49(4) of the *Employment Act*. Besides, the claimant had served for a long period of 14 year without any warning

letter. I rely on the case of Ol Pajeta Ranching Ltd v Muhoro [2017] KECA 329 (KLR) the Court of Appeal held that:-

> " In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention. Given that the respondent has received compensation for racial discrimination in terms of salary at the his work station, we think that an award of 6 months gross pay amounting to kshs.1,744,542 would be appropriate."

47. The rest of the awards by the trial court shall stand since no good grounds have been shown for interfering with the same.

Conclusion

48. I have found that the trial court did not err when she concluded that the dismissal of the respondent was unfair and unlawful. I have also found that the award of compensation, salary in lieu of notice, salary underpayment and certificate of service were justified and the trial court was right in awarding the same. I also found that the trial court never erred by finding that the Respondent was a Cashier and that his salary was underpaid. Finally, I have found that the trial court erred in awarding leave for 14 years without considering limitation period under Section 28(4) of the *Employment Act*. Consequently, the appeal partially succeeds and I make the following orders:-

a. The award of leave is varied to (Kshs. 32,669.28.) being an award of 18 months period upto 10th June 2019.

b. The rest of awards by the trial court remains unchanged.

c. The Appellant shall pay the costs of the suit in the subordinate court.

d. Each party shall bear own costs of this appeal, given the partial success of the same.

e. The award damages shall be subject to statutory deductions.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 29TH DAY OF JANUARY, 2026.

ONESMUS MAKAU

JUDGE

Appearance:

Okondo for the Appellant

Ego for the Respondent